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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of: **DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (*Phonorecords IV*)**	**Docket No. 21-CRB-0001-PR (2023-2027)**

PANDORA'S OPPOSITION TO COPYRIGHT OWNERS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND INFORMATION FROM SERVICES CONCERNING THEIR RATE PROPOSALS

INTRODUCTION

In their motion to compel additional documents and information from Pandora Media, LLC ("Pandora") and the other Services (the "Motion" or "Mot."), the Copyright Owners take the position that merely by submitting a rate proposal for the 2023-2027 period that incorporates aspects of the rate structure that has prevailed for the license at issue for more than 15 years—a percentage of revenue prong, a total-cost-of-content ("TCC") prong, and per-subscriber minima—Pandora has opened the door to virtually unlimited and highly burdensome discovery into every conceivable detail of its monthly revenue tracking and royalty reporting during the past five years. The Copyright Owners' demands are so painstakingly granular that (as but one example) they seek to compel production of the *computer code* for the programs that Pandora uses in connection with generating the necessary inputs into Pandora's calculations of royalties to be paid to under each of its licenses with music publishers, record companies, and performing rights organizations ("PROs").

The Motion is untimely and should be denied on that basis alone. It is also meritless. The Copyrights Owners fail to articulate any actual justification for this scorched-earth approach and the monumental burdens they seek to impose, resorting instead to bromides about needing a "complete picture" of Pandora's proposed rates and terms and their "impact," but little else. They nowhere explain (as they must) how their requests "directly relate" to Pandora's written direct statement, much less how the forensic month-by-month accounting detail they seek—stretching to the underlying details of its payment and revenue calculations to sound recording owners and PROs—would actually allow them meaningfully to understand and test Pandora's proposed rates and terms for the statutory mechanical license at issue in *this* proceeding. As we

explain herein, the additional discovery the Copyright Owners seek would not do so at all, let alone to a degree that could possibly justify the burden involved.

Pandora has already produced information more than sufficient to allow the Copyright Owners to test and thoroughly evaluate its rate proposal, including [redacted], and more. Pandora can only infer that Copyright Owners' continued push for additional monthly detail is a backdoor effort to audit its past payments and harass Pandora with complaints about prior calculations. This proceeding is not the proper venue for a royalty audit. The Motion should be denied in its entirety.

ARGUMENT

A. The Motion Should Be Denied As Untimely

The Copyright Owners did not file the Motion until January 26, 2022, well after the close of the discovery period on December 23, 2021, and well after the enlarged date (January 10) by which the Services agreed to accept Motions to Compel without objection to their timeliness.[1] The Motion therefore should be denied as violating 17 U.S.C. § 803(b)(6)(C)(iv) (providing "Discovery in connection with written direct statements shall be permitted for a period of 60 days"). While the Judges previously accepted a motion to compel filed after the close of

[1] Specifically, the Services agreed with the Copyright Owners that they would hold off filing their own motions to compel until January 10, 2022, and that they would not challenge motions filed by the Copyright Owners on or before that same date as untimely; however, they put the Copyright Owners on notice that they viewed any ripe motions to compel filed by the Copyright Owners *after* that date as untimely, and explicitly reserved all rights to challenge such motions on such grounds. *See* Ex. A, *Declaration and Certification of Todd D. Larson* ("Larson Decl.") at ¶ 8-9.

discovery—a decision that appears to undergird Copyright Owners' cavalier position that they can file motions to compel literally whenever they please—the prior ruling occurred under a very limited set of circumstances that are not present here. In *SDARS III*, SoundExchange received productions of documents from Sirius XM and Music Choice at the end of the discovery period. Lacking time to review the documents, SoundExchange filed a prophylactic motion to compel that same day in order to preserve its position in the event that it found the productions to be insufficient. As the Judges explained, that step was not necessary: "it would have sufficed if SoundExchange had simply placed the Services on notice that a discovery '*dispute*' existed (rather than filing a motion) because the Services had not yet produced the requested discovery, and that a subsequent motion might ensue." *Order Denying, Without Prejudice, SoundExchange's Motion to Compel the Services' Production of Certain Documents*, Docket No. 16-CRB-0001 SR/PSSR (2018-2022) (Sept. 13, 2016) at 3. The Judges added, "If SoundExchange ultimately conclude[d] that any…production…[was] incomplete or the completeness of its production [was] uncertain," it could then properly have filed a motion to compel after the close of the discovery period. *Id.* at 3 n. 4.

That particular situation bears no resemblance to the one present here. The Copyright Owners are not reviewing late-produced documents from Pandora to gauge its compliance with the requests addressed in the Motion. Nor was Pandora's position as to those requests in question at the close of discovery: for each of the requests at issue, Pandora had informed the Copyright Owners of its refusal to produce the requested information weeks earlier in its written objections and responses, which were served in a timely fashion and in accordance with the agreed-upon discovery schedule for this proceeding. Pandora's position as to the requests and interrogatories at issue in this Motion never wavered when the parties met and conferred. *See*

Larson Decl. ¶ 7. In short, the "dispute" was ripe weeks before the close of the discovery period, at which point Copyright Owners were fully aware of Pandora's position and could (and should) have filed their motion to compel by the deadline.[2]

Copyright Owners apparently believe themselves free to file a motion to compel *at any time* so long as the Copyright Owners merely noted their "dispute" with a Service's objection prior to the close of the discovery period. *See* Ex. 2 to Larson Decl. That position—under which no motion to compel would ever be due by the end of the discovery period—flies in the face of years of CRB discovery practice and extends well beyond the Judges' narrow prior ruling in *SDARS III*. That position is also an abuse of the expedited and carefully circumscribed discovery process set by the regulations operative in this proceeding. That cannot be what the Judges intended in the ruling on which the Copyright Owners rely, and the Copyright Owners' abuse of the discovery process should be rejected.

B. Pandora RFP No. 5 and Interrogatory No. 8 Do Not Seek Documents or Information Directly Related or Relevant to Pandora's Rate Proposal.

Two of the discovery requests at issue broadly concern Pandora's use of estimates in its royalty reporting, which is governed by the Section 115 regulations separately promulgated by the Copyright Office. *See* 37 C.F.R. § 210.27(d)(2)(k) (allowing for the use of estimates and requiring finalization of estimates in subsequent reports of adjustment). Pandora RFP No. 5 and Interrogatory No. 8 would require Pandora to produce information identifying *every single*

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[2] The Copyright Owners recognized as much by sending an eight-page letter to Pandora on December 21, 2021 stating, "Copyright Owners dispute all of Pandora's objections to discovery demands described herein," specifically identifying the same requests brought to the Judges' attention by the Motion. *See* Ex. 1 to Larson Decl. at 1.02, 1.07. That effort to gin up a still-pending "dispute" as of the close of discovery to support a later motion to compel should be rejected. Pandora's position objecting the requests at issue was long settled, as was the Services' collective position that for such ripe disputes, motions to compel filed after the close of discovery were untimely.

instance, over a 60-month period, where a component of Pandora's payable royalty pool under 17 U.S.C § 115—whether a revenue figure, a payment for performance rights or sound recordings, or otherwise—contained an estimated figure, how that estimate was "determined, calculated, and applied," *and* (in the case of Interrogatory 8) a written account of the date and amount of any subsequent *adjustment* to the estimate. The Motion as it relates to these burdensome and harassing requests should be denied.

The Copyright Owners have failed to meet their burden of showing how identifying specific estimates used in past payments——much less *all* of them—is directly related to Pandora's written direct statement, let alone how the demand for such comprehensive data is remotely proportional to the burden associated with providing it. Documents are "directly related" only to a topic that a participant has put "in issue" or made "a part of its case" in its written testimony. *See Order Granting in Part and Denying in Part SoundExchange's Motion to Compel Music Choice to Produce Documents and Respond to Interrogatories*, Docket No. 2011-1 CRB PSS/Satellite II (August 8, 2012). But Pandora *has not proposed* the use (or elimination) of any estimates in its Proposed Rates and Terms, and therefore has not put estimates "in issue" or made them a "part of its case."[3] The Motion as to Pandora RFP No. 5 should be denied on that basis alone.

Copyright Owners attempt to justify Pandora RFP No. 5 as "necessary to calculate the impact of the Services' proposed allocation and attribution of revenue to the Service Provider

[3] As noted, the use of estimates in Section 115 royalty reporting is instead governed by Copyright Office regulations. *See* 37 C.F.R. § 210.27(d)(2). While a service's compliance with those regulations might be the subject of an audit by the Mechanical Licensing Collective ("MLC"), their applicability does not fall under the purview of the Copyright Royalty Board or its rate-setting authority. As also noted, the requirement that services revise their estimates means that any estimate used in royalty reporting is only temporary and does not impact a service's final royalty obligation.

revenue pool." Mot. at 11. That justification says nothing regarding the use of *estimates*, and thus adds nothing to the Copyright Owners' argument. The Copyright Owners' stated justification for Interrogatory No. 8— that they want "a complete picture of the royalties paid and the impact of the Services' proposed estimates," Mot. at 6 —at least uses the word "estimates," but likewise fails to recognize that Pandora's rate proposal does not actually "propose" any estimates.

The Copyright Owners' pat single-sentence explanation about obtaining a "complete picture" or understanding the alleged "impact" of estimates does not come close to justifying the invasive and exceedingly burdensome discovery they seek. How does the fact that Pandora estimated its performance rights payments in a given month at, say, $1 million (as allowed under Copyright Office regulations) and then later adjusted that figure to $1.01 million (as required under Copyright Office regulations) allow the Copyright Owners to test or challenge Pandora's rate proposal? How will it impact the rate that is selected? Such "[b]road, nonspecific discovery requests are not acceptable" under CRB regulations, 37 C.F.R. § 351.5(b), and the Copyright Owners have provided no answers to these questions at all—much less answers that could justify why they possibly would need such specific information for every estimate made and subsequently finalized over the course of 60 prior months.[4]

Copyright Owners already have all the information they could possibly need on this topic. Pandora informed the Copyright Owners via its response to Interrogatory No. 8 that it

[4] As detailed in the accompanying declaration, to comply with such an order Pandora finance personnel would need to revisit every monthly report submitted during the 60 month period, reconstruct whether each component was an estimated or actual figure, then review subsequent reports to see whether and when an adjustment to every previously estimated figure was made—a task the relevant personnel estimate would take a Pandora employee an entire week working full time on that task alone to complete. Larson Decl. ¶ 17.

"[redacted]." In addition, since January 2021, 37 C.F.R. § 210.27(d)(2) has required that "A report of usage containing an estimate permitted by this paragraph (d)(2)(i) should identify each input that has been estimated, and provide the reason(s) why such input(s) needed to be estimated and an explanation as to the basis for the estimate(s)."[5] The Copyright Owners have failed completely to justify why they could possibly need more than that or how they would actually use it to challenge Pandora's Written Direct Statement. The Motion as it relates to Pandora RFP No. 5 and Interrogatory No. 8 should be denied.

C. Pandora RFPS No. 113-116 and Interrogatory No. 6. Do Not Seek Documents or Information Directly Related or Relevant to Pandora's Rate Proposal.

Pandora RFPs No. 113-116 and Interrogatory No. 6 seek all documents "underlying" the revenue totals (RFP 113), total content costs (RFP 114), performance royalty payment amounts (RFP 115) and subscriber counts (RFP 116) reported to the MLC, all musical work licensors, and all sound recording licensors, including all "data, formulas, and code" used to make the relevant calculation. As described in greater detail *infra*, for each of these categories of requests, Pandora has already produced a great deal of detailed data on revenue reported and payments made to its music licensors—far more than is sufficient to provide what the Copyright Owners might need (if any) for understanding, evaluating, and probing Pandora's written direct statement. The Copyright Owners, meanwhile, fail to demonstrate (and in some cases fail even to *try* to demonstrate) how the documents they seek are directly related to Pandora's written direct

[5] As discussed in prior motion practice before the Judges, the Copyright Owners already helped themselves to the Services' MLC reporting, so should have Pandora's reports in this regard. *See Services' Motion for Protective Order to Prevent Circumvention of Discovery Rules with Respect to Data in the Possession of the Mechanical Licensing Collective* at 2, August 16, 2021, eCRB Doc No. 25609.

statement, much less why anything more is required. And even if some loose "relation" could be discerned, the requests at issue are so inscrutably vague and (to the extent comprehensible) so incredibly burdensome that they should be summarily denied.

1. Pandora RFP 113 and Interrogatory No. 6. Do Not Seek Documents or Information Directly Related or Relevant to Pandora's Rate Proposal.

RFP 113 seeks documents "underlying" *every single revenue total* reported to the MLC or any musical work or sound recording licensor between 2017 and the present, including, remarkably, the "data, formulas and code" used to make that calculation.[6] Interrogatory No. 6 further demands that Pandora identify all situations where the service revenues it reported to any licensor was *different* from what was reported under 17 U.S. Code § 115.

These "broad, nonspecific discovery requests" for the minutiae of Pandora's financial and royalty records bears no reasonable relationship to a legitimate effort to test Pandora's rate proposal. To the extent Copyright Owners wish to understand Pandora's payments under the current rate structure and revenue definition, they already have everything they need: With respect to Pandora's mechanical license calculations, Pandora has produced its [redacted]

[6] For instance, if Pandora paid Universal Music Group ("UMG") $5 million in royalties for Pandora Plus in June 2018 for sound recording use, the Copyright Owners want not only documents identifying the amount of that payment, but documents identifying the underlying revenue figure that was reported to UMG to calculate the royalty payment. But not just that. The Copyright Owners also want documents "underlying" how that reported revenue figure itself was calculated. But not just *that*: the Copyright Owners also want the computer code used to calculate the revenue that was reported to UMG for the purposes of calculating the revenue pool for purposes of calculating the royalty owed to the licensor for purposes of calculating the TCC for purposes of calculating the mechanical royalty (ultimately) paid. And they want these documents not just for June 2018, but for *sixty months*—and not just for UMG, but for *every music licensor Pandora has*.

[redacted]. *See* Larson Decl. ¶¶ 11-15. And for the other two of those inputs, TCC and performance rights payments (the subject of RFPs 114 and 115), Pandora has produced [redacted]. Larson Decl. ¶¶ 12, 15.

The Copyright Owners' position is that if a service proposes a percent-of-revenue rate prong for the going-forward period, that proposal in itself justifies essentially unlimited and tremendously invasive discovery, [redacted], but every detail underlying the service's calculations of revenue as reported to those third party sound recording and performance right licensors for the prior period—to the point of actually demanding the computer code that processes those calculations. The governing discovery standard does not support that sort of harassment or anything close to it. As the Judges have explained, "The mere mention" of some piece of evidence in written testimony, "while sufficient to make that [evidence]'directly related' to a party's [written testimony], does not necessarily render discoverable every document connected in some way" to that piece of evidence." *Discovery Order 9* at 4, *Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (Web IV),* No. 14-CRB-0001-WR (2016-2020) (Jan. 15, 2015).

What is worse, the Copyright Owners make no attempt even bothering to explain how the excruciating level of detail they seek is either directly related to Pandora's written direct statement or actually necessary to test Pandora's case. While they note that they seek documents and information "showing how revenues for the Services' respective offerings have been reported," Mot. at 8, they fail to acknowledge that Pandora has already produced that information. The Copyright Owners also argue that "the method of calculating Service Provider Revenue may be highly variable" from "licensor to licensor," and that if the "revenue total for a distinct offering" was not reported uniformly to each of the MLC and different licensors, "such information is relevant to CO's ability to test and challenge how each Service has calculated and reported…its revenues."[7] Mot. at 8-9. Copyright Owners' choice of words here is telling. The proper place to "test and challenge" how Pandora "calculated and reported its revenues" in prior periods is an *audit*, not a rate proceeding, which is a forum to test and challenge Pandora's *rate proposal*, not its reporting compliance. Moreover, if the Copyright Owners are suggesting variation across reported revenue totals to various licensors reflects wrongdoing or errors in Pandora's reporting under Section 115, they miss the mark. To the extent that Pandora reports different revenue totals to different licensors, that merely reflects that Pandora's license agreements with other licensors (all of which have been produced) often have *revenue definitions* that differ from those found in the Section 115 regulations.

At the end of the day, *how* Pandora calculated revenues reported to *other* licensors under *different* revenue definitions is not remotely relevant—much less "directly related" —to Pandora's proposed definition for the statutory license at issue *here* or to the Copyright Owners'

[7] This is apparently why the Copyright Owners specifically ask in Interrogatory No. 6 for the Services to "Identify and explain each instance in which You reported to any Licensor different revenues" than reported under Section 115. Mot. at 8.

ability to identify what will be paid under *this* definition. The Copyright Owners have failed to justify the burden on Pandora of producing the requested month-by-month information, which Pandora personnel estimate would require approximately 120 hours of work in total for all 60 months.[8] Larson Decl. ¶ 18.

2. Pandora RFP No. 114 Does Not Seek Documents or Information Directly Related or Relevant to Pandora's Rate Proposal.

RFP No. 114 seeks the same unnecessary detail with respect to the calculation of Pandora's TCC as RFP 113 seeks with respect to Pandora's reported revenue pool to its various licensors, i.e., the "underlying" detail of every reported TCC total in Pandora's mechanical license royalty pool calculation, including the "code" or "formulas" used to make that calculation. It should be denied for the same reasons.

First, as described above, Pandora has already produced information [redacted]. Larson Decl. ¶¶ 13-15. The Copyright Owners provide no explanation as to why they need any more detailed information on Pandora's label payments, other than the fact that Pandora has a TCC prong in its rate proposal. Instead, the Copyright Owners seek refuge under a prior CRB order stating, "[B]y advocating for a revenue prong that is based in part on a percentage of Label payments," each "has put squarely at issue in this case all consideration that it has provided to Labels." Mot. at 13 (quoting *Order Granting in Part and Denying in Part Copyright Owners' Motion to Compel Production of Documents Concerning Record Label Ownership Equity in Spotify*, Docket No. 16-CRB-0003-PR (2018-

[8] We address this burden further in Section C.4 below.

2022)("*Phonorecords III Order*") at 3). Putting aside that Pandora has already produced all the "consideration" it has provided to the labels, the referenced order was much more narrow than represented and does not support the Copyright Owners' position. In that Order, the Judges found that because "equity interests allegedly were part of the compensation that Spotify paid to record companies for their content," Spotify was required to produce documents specifically "relating to equity interests that were granted as compensation for a license to perform sound recordings." *Phonorecords III Order* at 3-4. In other words, Spotify could not shield from view a certain category of consideration paid to the record companies.

But when it came to the level of *detail* that Spotify had to disclose regarding that consideration, the Judges ruled that "*All* Documents concerning equity acquired in Spotify by any record label, including documents concerning the terms of acquisition, consideration paid for the interest, type of interest, percentage of total interests and any estimates of the value of such interest, at every level of specificity at which they are created or maintained" were "not, in themselves, directly related to Spotify's rate proposal." *Id.* at 1, 3. Therefore, while the Copyright Owners could compel documents identifying the value of the consideration paid to record companies for their content (which could be argued to factor into Spotify's TCC), the Judges did not order discovery providing every intimate detail of that payment or every document related to it. Copyright Owners' vaguely stated desire to get a "complete and accurate picture" of Pandora's royalty calculations does not justify a different result here.

Once again, *how* Pandora calculated its label payments, and whether or not they were calculated properly month to month might be the appropriate subject of a record-company audit (and perhaps a subsequent adjustment to Pandora's Section 115 payments if an error was revealed), but it is irrelevant to testing Pandora's rate proposal here, which neither governs nor

turns on the methodology or accuracy of Pandora's TCC calculation in any given month. The requested information simply does not logically allow the Copyright Owners to perform any kind of additional test on Pandora's rate proposal—and if it does, the Copyright Owners have certainly not said why or how.[9] The Motion should therefore be rejected as it relates to RFP No. 114.

3. Copyright Owners' Motion as to Pandora RFPs No. 115 and 116 Should Be Denied for the Same Reasons as the Prior Requests.

As with RFP Nos. 113 and 114, RFP Nos. 115 and 116 seek documents "underlying" every reported performance royalty payment (in the case of RFP No. 115) and subscriber total (in the case of RFP No. 116) reported to MLC or a publisher licensor as part of Pandora's mechanical royalty calculations. The Motion should be rejected for the same reasons as articulated above with respect to RFP Nos. 113 and 114.

To say it again, Pandora has produced sufficient information to [redacted]. Larson Decl. ¶ 12. Pandora has likewise produced [redacted]. Larson Decl. ¶ 14. Here again, the Copyright Owners provide no reasonable explanation for why what

[9] Nor does any of the precedent relied upon by Copyright Owners suggest otherwise. *See, e.g. Order Granting SoundExchange's Motion to Compel NAB to Produce Certain Financial Documents*, Docket No. 14-CRB-0001 WR (2016-20) (Jan. 15, 2015) at 3 (granting SoundExchange's motion to compel NAB's balance sheets, income statements, financial projections/forecasts/budgets, and documents showing streaming revenues and expenses because "NAB has placed the economic viability of streaming radio simulcasts at issue in its WDS"—precisely the kinds of top-level assessments Pandora has already provided in spades here.)

Pandora has produced is not enough, other than to note that Pandora's rate proposal deducts performance royalties and has a pre-subscriber royalty prong. Mot. at 15. But that is merely an observation, not a justification.

As with TCC, how the calculation of Pandora's performance royalty payments is done and whether it is accurate—and even more attenuated, how the reported *revenue* that forms the basis of those royalty payments is calculated and whether *it* is accurate —plays no conceivable, let alone "directly related," role in testing Pandora's rate proposal, which simply allows for the deduction of performance royalties (as has been the case since *Phonorecords I*) and does not turn in any way on the methodology or accuracy of Pandora's performance royalty calculations in a given month. If those payments are audited and turn out to be incorrect, Copyright Office regulations call for an adjustment to the mechanical royalty calculation, but that is all.

4. Pandora RFPs No. 113-116 Should Be Rejected as Vague and Burdensome.

In addition to the specific issues identified above as to the irrelevance of the details Copyright Owners demand, the Motion should be denied for another reason: RFP Nos. 113-116 are confusingly vague. What, exactly, are documents "underlying" a reported revenue figure: individual invoices sent to subscribers? What about documents "underlying" a subscriber count: the names and addresses of each individual subscriber? What is the "code referenced or used to calculate the revenue total": the formulas in an excel spreadsheet? The SQL code that queries a database? If the Copyright Owners were granted the relief they seek, it is exceedingly unclear what Pandora would have to do to comply with the requests. When Pandora met and conferred with counsel for the Copyright Owners and pressed this point, the Copyright Owners were unable to identify what specific kinds of information they were looking for beyond what had

already been produced, claiming that it was not their responsibility to tell Pandora what information is stored in Pandora's systems. Larson Decl. ¶ 10.

In addition, as described above and as further detailed in the accompanying declaration, *see* Larson Decl. ¶¶ 16-19, the burden of complying with these exceedingly "broad" and "nonspecific" requests far outweighs the extremely limited value of the requested information. As the Judges held in a prior proceeding, the Copyright Owners "ask[] for too much without sufficient justification that the burden or expense of producing the requested materials is less than the likely benefit to the movants and the probative value." *Order Regarding Digital Media Association and Its Member Companies' Motion To Compel SoundExchange To Produce Negotiating Documents Related to Its Direct Statement* at 1, Docket No. 2005-1 CRB DTRA (March 27, 2006) (*Web II*) (limiting discovery only to documents strictly necessary to assess the benchmark proposed without imposing the burden "that the full requests would involve."); *see also Order Granting in Part and Denying in Part the Motion of XM Satellite Radio Inc., Sirius Satellite Radio Inc., and Music Choice to Compel SoundExchange to Produce Label License Agreements and Related Negotiation Documents* at 2, Docket No. 2006-1 CRB DSTRA (May 17, 2007) (*SDARS I*) ("The limited discovery permitted in proceedings before the Copyright Royalty Board should permit the parties to test admissible evidence, but not create an extensive burden of time and expense. A balance of interests is required."). The Copyright Owners' fishing expedition should be rejected.

CONCLUSION

For the foregoing reasons, the Motion should be denied in its entirety.

DATED: February 3, 2022

Respectfully submitted,

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Exhibit A

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress
Washington, D.C.

In re **DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords IV)**	**Docket No. 21-CRB-0001-PR (2023-2027)**

DECLARATION AND CERTIFICATION OF TODD D. LARSON
(On behalf of Pandora Media, LLC)

1. I am counsel for Pandora Media, LLC ("Pandora"), in the above-captioned matter. I am familiar with the facts, circumstances, and proceedings in this matter and submit this declaration in support of the Opposition of Pandora Media, LLC. to the Copyright Owners' Motion to Compel Production of Documents and Information From Services Concerning Their Rate Proposal.

I. Pandora's Discovery Responses and the Participants' Agreement Regarding Timing for Motions to Compel

2. Pandora served its Responses and Objections to Copyright Owners First Set of Requests for Production of Documents ("Pandora's First RFP R&Os") on November 12, 2021. Pandora's First RFP R&Os contained Pandora's objections and response to Request No. 5. Pandora objected to the request as overbroad, unduly burdensome, vague and ambiguous, as seeking documents not directly related to Pandora's written direct statement, and as an impermissible broad, non-specific discovery request. Pandora responded that with respect to its previous royalty reporting, it would only produce documents responsive to Request No. 3, and not search separately for documents responsive to Request No. 5.

3. Pandora served its Responses and Objections to Copyright Owners Second Set of Requests for Production of Documents ("Pandora's Second RFP R&Os") on November 22, 2021. Pandora's Second RFP R&Os contained Pandora's objections and response to Request Nos. 113-116. Pandora objected to each request as vague and ambiguous, overbroad, unduly burdensome, and as seeking documents not directly related to Pandora's written direct statement, and stated that it would not search for or produce documents in response to the requests.

4. Pandora served its Objections to Copyright Owners' Second Set of Interrogatories to Each of the Services ("Pandora's Second ROG Objections") on November 12, 2021. As relevant here, Pandora's Second ROG Objections contained Pandora's objections to Interrogatories 6 & 8. Pandora objected to Interrogatory 6 as overbroad, unduly burdensome, and as seeking information irrelevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence, and stated that it would not provide any further response. Pandora objected to Interrogatory 8 as overbroad, unduly burdensome, improper, and as seeking information irrelevant to this proceeding and not reasonably calculated to lead to the discovery of admissible evidence, and stated that it would only "identify at a general level the categories of information, if any, for which Pandora uses estimates to determine inputs," which it did on November 29, 2021.

5. Pandora subsequently served three amended responses and objections to Copyright Owners Second Set of Interrogatories to Each of the Services, each providing the Copyright Owners with additional information, but none of those amendments changed Pandora's responses and objections to Interrogatories 6 & 8.

6. The Copyright Owners sent a letter to Pandora on December 21, 2021 identifying purported "discovery disputes" related to Pandora's discovery responses. A true and correct

copy of the December 21, 2021 letter from Josh Weigensberg to Todd Larson is attached hereto as Exhibit 1. That letter acknowledged Copyright Owners' understanding that Pandora was standing on its objections to Request No. 5 and "will not produce responsive documents," and that Pandora had "refused" to produce documents in response to Requests 113-116. It also acknowledged that Pandora had refused to provide a response to Interrogatory No. 6 and any further response to Interrogatory No. 8.

7. Pandora's positions on Request No. 5, Requests Nos. 113-116, and Interrogatories 6 and 8, as identified in Pandora's First RFP R&Os, Pandora's Second RFP R&Os, and Pandora's Second ROG Objections did not change during the course of the Parties' meet and confer process. The Copyright Owners' December 21 letter confirms the Copyright Owners' understanding of Pandora's previously articulated positions. *See* Exhibit 1 at 2 (RFP Nos. 5, 113-116), 7 (Interrogatories 6 & 8).

8. Since direct-phase discovery closed so close to the holidays (December 23, 2021), the Participants agreed to a "stand down" period during which they would refrain from filing motions to compel. In an email exchange between counsel, the Participants agreed not to serve motions to compel until January 10, 2022, and the Participants reserved their rights with respect to arguments regarding the timeliness of motions filed after that date.

9. A true and correct copy of the December 22, 2021 email between Josh Branson and Marion Harris memorializing the Participants' agreement is attached hereto as Exhibit 2. Mr. Branson made clear the Services' position that motions to compel on then-ripe discovery disputes filed after January 10 were untimely.

10. I participated in a phone call with counsel for Copyright Owners on January 18, 2022. On that call, when I pressed Mr. Weigensberg on what specific types of documents

Copyright Owners were seeking in response to Requests 113-116, he declined and informed me, in sum and substance, that it was not Copyright Owners' place to tell Pandora what sort of responsive information it maintains or should produce.

II. Pandora's Document Productions

11. Pandora has produced thousands of documents bearing on the topics identified in the requests for production and interrogatories addressed in the Copyright Owners' motion. Descriptions of these documents and the Bates ranges are identified below.

12. **Performance Rights Payments**: Pandora has produced documents [redacted]. *See* PAN_PHONO4_00001864 to PAN_PHONO4_00002082.

13. **Mechanical Rights Royalty Payments**: Pandora has produced its [redacted]. *See* PAN_PHONO4_00002083 to PAN_PHONO4_00002247; PAN_PRIII_Remand_00030541 to PAN_PRIII_Remand_00030604. Pandora has also produced documents [redacted]. *See* PAN_PRIII_Remand_00030605 to PAN_PRIII_Remand_00030620.

14. **Subscriber Counts**: Pandora has produced a document [redacted]. *See* PAN_PHONO4_00000422. Pandora has also produced a document [redacted]. *See* PAN_PRIII_Remand_00025550. Pandora has also produced a document [redacted]. *See* PAN_PHONO4_00000421.

15. **Record Company Payments (TCC)**: Pandora has produced a document [redacted]. *See* PAN_PRIII_Remand_00025549. Pandora also produced a document [redacted]. *See* PAN_PHONO4_00002663. Pandora has also produced "top sheets": statements sent to record companies [redacted] used to calculate the royalty payments. *See* PAN_PRIII_Remand_00030621 to PAN_PRIII_Remand_00033917.

III. Burden

16. On February 2, 2022, I conferred with Pandora personnel who oversee the company's royalty reporting functions to discuss the information sought by the Copyright Owners in their motion to compel and to ascertain the burden associated with compiling and producing such information.

17. With respect to identifying each estimate used in connection with Pandora's royalty reporting, including performance royalties, Pandora personnel informed me that performance royalties are typically reported initially as estimates and then trued up during the annual statement of account ("ASOA") process. They indicated that producing the information at the level of specificity requested by the Copyright Owners—including matching initial estimates against later adjustments—would require Pandora to work with its outside vendor, Music Reports, Inc. ("MRI") to locate and identify the original version of a given month's report that was prepared and submitted. Pandora personnel would then need to examine each component of the report to identify which contained estimates (including identifying and reviewing underlying source documents to determine how the estimate was calculated), and compare that against later reports to determine when an adjustment was made to a previously estimated figure, and how much. Pandora personnel estimated that compiling the requested information for each of 60 months would take approximately 40 person-hours of work.

18. With respect to information "underlying" the revenue and TCC totals reported in its various royalty reports, Pandora personnel indicated that identifying and compiling the requested information (the underlying sources, details, and calculations of every revenue total reported to every licensor, each of which has its own service revenue definition) would be extraordinarily complex and time-consuming. Pandora personnel estimated that compiling such data would, on average, require approximately two hours for each month of reports examined,

(*i.e.*, 120 total person-hours for a 60-month period). Moreover, because of changes over time in personnel, reporting systems, and processes, the more distant the reporting period is in the past, the more complicated it would be to identify and compile the underlying data sources. Notably, the work identified in paragraphs 17 and 18 would likely be completed by the same person, who would need to do that work in addition to her regular duties for Pandora's finance organization (*i.e.*, not instead of those duties); as a practical matter, then, it could realistically take several weeks for Pandora to gather, review, and produce the requested information.

19. With respect to subscriber counts used in Section 115 royalty pool calculations, Pandora's personnel indicated that the information "underlying" the subscriber counts maintained in its database (which are provided to the royalty reporting team for each royalty report) is maintained as individual subscriber records.

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: February 3, 2022
New York, NY

/s/ Todd D. Larson

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Exhibit 1

RESTRICTED–Subject to Protective Order in Docket No. 21-CRB-0001-PR (2023-2027)

Exhibit 2

RESTRICTED–Subject to Protective Order in Docket No. 21-CRB-0001-PR (2023-2027)

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress
Washington, D.C.

In re **DETERMINATION OF RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords IV)**	**Docket No. 21-CRB-0001-PR (2023-2027)**

DECLARATION AND CERTIFICATION OF TODD D. LARSON REGARDING RESTRICTED PROTECTED MATERIAL

(On behalf of Pandora Media, LLC)

1. I am counsel for Pandora Media, LLC ("Pandora") in the above-captioned case. I respectfully submit this declaration and certification pursuant to the terms of the Amended Protective Order issued November 4, 2021 (the "Protective Order"). I am authorized by Pandora to submit this Declaration on Pandora's behalf.

2. I am familiar with Pandora's Opposition to Copyright Owners' Motion to Compel Production of Documents and Information from Services Concerning their Rate Proposals and the documents appended thereto (the "Opposition"), and with the definitions and terms provided in the Protective Order. After consultation with my client, I have determined to the best of my knowledge, information and belief that the Opposition contains information that Pandora has designated as "Restricted" as defined by the Protective Order (the "Protected Material"). Portions of the Opposition containing Protected Material have been marked Restricted in accordance with the Protective Order. The Protected Material includes, but is not limited to, financial and royalty payment information that is not available to the public and is highly competitively sensitive.

3. If this financial and royalty payment information were to become public, it would place Pandora at a commercial and competitive disadvantage, unfairly advantage other parties to the detriment of Pandora, and jeopardize its business interests. Information related to Pandora's confidential financial and royalty payment information could be used by Pandora's competitors, or by other content providers, to formulate rival bids, bid up Pandora payments, or otherwise unfairly jeopardize Pandora's commercial and competitive interests.

4. The financial and royalty payment information described in the paragraphs above must be treated as Restricted Protected Material in order to prevent business and competitive harm that would result from the disclosure of such information while, at the same time, enabling Pandora to provide the Copyright Royalty Judges with the most complete record possible on which to base their determination in this proceeding.

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: February 3, 2022
New York, NY

/s/ *Todd D. Larson*

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Proof of Delivery

I hereby certify that on Thursday, February 03, 2022, I provided a true and correct copy of the Pandora's Opposition to Copyright Owner's Motion to Compel Production of Documents and Information From Services Concerning Their Rate Proposals (PUBLIC) to the following:

Zisk, Brian, represented by Brian Zisk, served via ESERVICE at brianzisk@gmail.com

Joint Record Company Participants, represented by Susan Chertkof, served via ESERVICE at susan.chertkof@riaa.com

Amazon.com Services LLC, represented by Joshua D Branson, served via ESERVICE at jbranson@kellogghansen.com

Google LLC, represented by Gary R Greenstein, served via ESERVICE at ggreenstein@wsgr.com

Apple Inc., represented by Mary C Mazzello, served via ESERVICE at mary.mazzello@kirkland.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

Spotify USA Inc., represented by Joseph Wetzel, served via ESERVICE at joe.wetzel@lw.com

Powell, David, represented by David Powell, served via ESERVICE at davidpowell008@yahoo.com

Copyright Owners, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Signed: /s/ Todd Larson